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No. 83-691

In The

Supreme Court of the United States

October Term, 1983

NADA NOVAKOVICH ALUEVICH,

Petitioner,

vs.

HARRAH'S, a Nevada corporation; HARRAH'S CLUB, a Nevada corporation; HOLIDAY INNS, INC., a Tennessee corporation; L. MEAD DIXON; LLOYD DYER; ROMANO ANDREOTTI; MAURICE SHEPPARD; BOB CONTOIS; GEORGE POORE; ARTHUR SMITH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the United States Supreme Court have jurisdiction to grant a Petition for a Writ of Certiorari to the Nevada Supreme Court when the Fourteenth Amendment questions raised in the Petition were not addressed or considered by the state court, and where the petitioner raised the constitutional questions for the first time in a Petition for Rehearing of the state court's decision?

2. Does the decision of the Nevada Supreme Court, that petitioner failed to establish the requisite special element of reliance or fiduciary duty necessary to a cause of action for breach of an implied covenant of good faith and fair dealing, present a sufficiently substantial and important federal question to warrant granting a Petition for a Writ of Certiorari?

LIST OF PARTIES

Respondents herein, with the exception of Arthur Smith,[1] were the respondents in the Supreme Court of Nevada.

Harrah's, a Nevada corporation, is presently a wholly owned subsidiary of Holiday Inns, Inc., a Tennessee corporation. Harrah's Club, a Nevada corporation, is presently 85.12% owned by Holiday Inns, Inc. and 14.88% owned by Harrah's.

The listing of all parent companies, subsidiaries, and affiliates of HARRAH's, a Nevada corporation, HARRAH's CLUB, a Nevada corporation, and HOLIDAY INNS, INC., a Tennessee corporation, is included herein as Appendix A, as required by Supreme Court Rule 28.1.

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[1] Arthur Smith was dismissed from the appeal to the Nevada Supreme Court due to lack of jurisdiction, and therefore was not a party to the decision.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents hereby submit this brief in opposition to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents respectfully submit that the jurisdictional requirements of 28 U. S. C. § 1257(3) have not been satis-

fied by petitioner, and for that reason this Court should decline jurisdiction of this case.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

Article 1, Section 15 of the Nevada Constitution

No . . . law impairing the obligation of contracts shall ever be passed.

28 U.S.C. § 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Supreme Court Rule 17.1

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. . . .

Supreme Court Rule 21.1(h)

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify

the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

NRAP[2] *28(a)(2)*

(a) *Brief of the Appellant.* The brief of the appellant shall contain under appropriate headings and in the order here indicated:

. . .

(2) A statement of the issues presented for review.

NRAP 40(c)(1)

(c) *Scope of Application; When Rehearing Considered.*

(1) . . . no point may be raised for the first time on rehearing.

STATEMENT OF THE CASE

The Statement of The Case by petitioner is, for the most part, nothing more than a selective interpretation of her testimony at trial. In this regard, it must be noted

[2] "NRAP" is an abbreviation for the Nevada Rules of Appellate Procedure.

that petitioner alleged multiple claims for relief against respondents, including claims for fraud and interference with prospective business advantage. The latter two claims went to a jury, and a verdict was returned in favor of respondents. The Respondents' Statement of Case and Statement of Facts from their brief to the Nevada Supreme Court is included herein as Appendix B. This Statement contains ample citations to the record, to aid this Court's decision. *See Webb v. Webb*, 451 U. S. 493, 495 n. 2 (1981).

This case concerns the enforceability of an unqualified cancellation clause contained in a commercial sublease negotiated between sophisticated parties not bound by any special element of reliance or fiduciary duties.

HARRAH'S CLUB leased the Byington Building from the Byington Estate on December 30, 1958. HARRAH'S CLUB subleased a portion of the premises to petitioner and her late husband on January 16, 1968, for a five year term. The sublease contained the following clause:

> The Lessor shall have the option to cancel this Lease upon ninety (90) days' written notice to the Lessees.

The sublease provided that, in the event the option to cancel was exercised by HARRAH'S CLUB, HARRAH'S CLUB was to pay to petitioner the unamortized portion of any improvements she had made to the premises, based upon the number of months remaining under the lease.

On March 1, 1973, HARRAH'S CLUB relet the premises to petitioner for a period of five years, "unless sooner terminated as hereinafter provided." The language of this sublease was substantially similar to the previous lease, and the cancellation clause was identical, as quoted above.

On March 1, 1978, the 1973 sublease was renewed for a term of five (5) years, on the "same terms, conditions, covenants, and agreements" as the 1973 sublease, with some modifications concerning rent, improvements, and renewal. See Appendix B. During negotiations deletion of the cancellation clause was discussed; the cancellation clause remained intact. HARRAH'S CLUB had a policy requiring a cancellation clause in all of its leases.

On October 2, 1978, pursuant to the termination privilege contained in the 1978 sublease, HARRAH'S CLUB served notice on petitioner of its intention to cancel the sublease. The effective date of cancellation was January 1, 1979, but HARRAH'S CLUB granted an extension until February 28, 1979. Petitioner vacated the premises on that date. Following the cancellation, petitioner filed a complaint alleging numerous claims for relief.

The alleged claim for relief which is the focus of the instant petition is for tortious breach of an implied covenant of good faith and fair dealing. Application of such a covenant under the circumstances of the case was thoroughly argued and briefed *prior* to trial.[3] Petitioner made no suggestion that her lawsuit had potential constitutional ramifications.

The case went to trial, and after the evidence had been presented, the trial court held that no genuine issue as to any material fact existed regarding what it referred

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[3] The pleadings filed with respect to the implication of a covenant of good faith in the sublease were voluminous, and appear in the Record on Appeal ("ROA") at the following pages: ROA Vol. II, 364-457; ROA Vol. II, 524-620; ROA Vol. III, 629-646; ROA Vol. III, 701-750.

to as the "bad faith" claim, and thus granted a directed verdict as to this claim in respondents' favor, pursuant to Rule 50(a) of the Nevada Rules of Civil Procedure.

Petitioner appealed the directed verdict to the Nevada Supreme Court. Petitioner argued that the covenant of good faith and fair dealing should be implied in her sublease with HARRAH'S CLUB. Respondents argued that the cancellation clause was clear, unqualified and unambiguous, and should be enforced as written. At no point in either her opening brief or reply brief to the Nevada Supreme Court did petitioner suggest the existence of any potential constitutional questions or ramifications in the case.

The Nevada Supreme Court held in favor of respondents.

> In the present case, the appellant is an experienced business person and an attorney. The unqualified termination privilege was the subject of negotiations for ten years. Although the cancellation privilege remained unqualified, appellant continued to renew the subleases. The relationship between appellant and respondent was that of lessee and lessor. We do not find, in the present case, the special element of reliance which [has earlier prompted this court] to recognize a cause of action in tort for the breach of an implied covenant of good faith and fair dealing.

Aluevich v. Harrah's, 99 Nev. 215, 218, 660 P. 2d 986, 987 (1983).

Petitioner subsequently filed a Petition for Rehearing in the Nevada Supreme Court on April 15, 1983, claiming in the petition for the *first time* that an unwillingness to recognize a cause of action under the circumstances of

her case constituted a denial of equal protection of the laws under the Fourteenth Amendment.

The Nevada Supreme Court denied the Petition for Rehearing without opinion, citing NRAP 40(c) which provides in part that "no point may be raised for the first time on rehearing."

STAGE AT WHICH THE FEDERAL QUESTIONS WERE RAISED

As detailed in Respondents' Statement of the Case, and the argument which follows, petitioner did nothing to specially set up or claim her alleged federal constitutional rights until the Petition for Rehearing to the Nevada Supreme Court.

Contrary to the assertion in the petition, the Petition for Rehearing did not challenge the Nevada Supreme Court's decision by reason of any violation of Article I, Section 10 of the United States Constitution. That constitutional provision was not cited, nor were any rights claimed under the Nevada Constitution, Article 1, § 15. *See Webb v. Webb,* 451 U. S. at 496-498; *Bowe v. Scott,* 233 U. S. 658, 665 (1914).

ARGUMENT

I.

The Supreme Court does not have jurisdiction to review a state court decision when the state court never addressed or considered the purported federal questions, and where the federal questions were raised by the petitioner for the first time in a petition for rehearing of the state court's decision.

It is a long-settled rule that the jurisdiction of the United States Supreme Court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb,* 451 U. S. at 496. Because this case presents a petition for a writ of certiorari to a state court, the relevant jurisdictional statute is 28 U. S. C. § 1257. As applied to the circumstances of this case, that statute requires that in the state courts petitioner has "specially set up or claimed under the constitution . . . of . . . the United States" those rights which she now seeks to have this Court enforce. 28 U. S. C. § 1257(3). *Webb v. Webb,* 451 U. S. at 495.

Supreme Court Rule 21.1(h) requires a petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; *the method or manner of raising them* and the way in which they were passed upon by the court." (Emphasis added.)

Petitioner's jurisdictional statement asserts that the federal questions in this case were first "raised" when the trial court "withdrew" the issue concerning application of the implied covenant of good faith and fair dealing from the jury. Petitioner misconceives the jurisdictional requirement that federal questions be specifically set up or claimed. It was incumbent upon petitioner to affirmatively argue the possible constitutional ramifications of the case as soon as the purported federal questions arose. In other words, at all stages when the question as to application of the covenant of good faith and fair dealing was in issue, petitioner was required to inform the court of the purported federal questions she now seeks to raise.

As the record in this case shows, application of the covenant of good faith and fair dealing was indeed argued at nearly every stage of the proceeding. With the exception of this petition and the Petition for Rehearing of the Nevada Supreme Court's decision, petitioner never so much as mentioned that her lawsuit had potential federal constitutional ramifications.[4]

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[4] Application of the covenant of good faith and fair dealing under the facts of the case was thoroughly argued and briefed during the following stages of the proceeding without a single mention of a purported federal question by petitioner:

1. Prior to trial, see note 3, *supra*.
2. Motion for Directed Verdict. See ROA Vol. IX, 968-1002.
3. Petitioner's Opening Brief to Nevada Supreme Court.
4. Petitioner's Reply Brief to Nevada Supreme Court.
5. Oral Argument to Nevada Supreme Court.

In deciding whether a federal question has been "specifically set up or claimed" within the meaning of 28 U. S. C. § 1257(3), it is relevant and usually sufficient to ask whether the petitioner satisfied the state rules governing presentation of the issues. *See, e.g., Beck v. Washington,* 369 U. S. 541, 549-554 (1962), *Food Employees v. Valley Plaza,* 391 U. S. 308, 334-335 (1968) (Harlan, J., dissenting).

As is manifest from the opinions rendered by the members of the Nevada Supreme Court, the state court never considered the case to have potential constitutional ramifications. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this Court can *affirmatively* show the contrary." (Emphasis added.) *Webb v. Webb,* 451 U. S. at 495, quoting *Street v. New York,* 394 U. S. 576, 582 (1969). Failure to present the federal question in conformance with state procedure constitutes adequate and independent grounds of decision barring review in the United States Supreme Court, so long as the state has a legitimate innterest in enforcing its procedural rules. *Michigan v. Tyler,* 436 U. S. 499, 512, n. 7 (1978); *Stembridge v. Georgia,* 343 U. S. 541, 547 (1952).

It is clear in this case that petitioner has failed to follow well-established procedural requirements in presenting her purported federal questions to the Nevada Supreme Court. Federal questions which the highest state court is, by its settled practice, justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel, will not

serve as the basis of a writ of error from the federal Supreme Court. *Beck v. Washington, supra*; *Hulbert v. Chicago,* 202 U. S. 275, 281 (1906).

As discussed above, petitioner never mentioned that this case had potential federal constitutional ramifications until her Petition for Rehearing to the Nevada Supreme Court. A constitutional issue not raised to or passed upon by the trial court will seldom be considered by the Nevada Supreme Court on appeal. *Munoz v. State, ex rel. Dep't. of Hwys.,* 92 Nev. 441, 444, 552 P. 2d 42, 43-44 (1976), citing *Tennessee v. Dunlap,* 426 U. S. 312 (1976).

Rule 28(a) (2) of the Nevada Rules of Appellate Procedure required petitioner to set forth in her opening brief a statement of the issues presented for review.[5] Unless there has been clear error, the Nevada Supreme Court will not consider questions which have not been raised in the briefs or in oral argument. *Wittenberg v. Wittenberg,* 56 Nev. 42, 455-456, 55 P. 2d 619, 624 (1936); *Walker v. Burkham,* 67 Nev. 541, 577, 222 P. 2d 205, 223 (1950).

Moreover, it is established beyond doubt in Nevada that "no point may be raised for the first time on rehearing." NRAP 40(c) (1). *Powell v. N. C. & O. Ry,* 28 Nev. 305, 82 P. 96 (1905); *State v. Ceja,* 53 Nev. 281, 2 P. 2d 124 (1931); *In re Lorring,* 75 Nev. 330, 335, 340 P. 2d 589 (1959). This Court has recognized the reasonability of Nevada procedural rules in the past. *N.-C.-O.*

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[5] A copy of the issues presented for review in petitioner's opening brief to the Nevada Supreme Court is included herein as Appendix C. No constitutional issue was raised.

Ry. v. Burris, 38 Nev. 156, 145 P. 926 (1914), *aff'd*, 244 U. S. 103 (1917). (Refusal of trial court to allow leave to amend answer at trial in order to assert a federal question).

It has likewise been repeatedly emphasized by this Court it is too late to raise a federal question for the first time in a petition for rehearing, after the final judgment of the state court of last resort.

> [I]t is elementary that a mere assertion in a state court or a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes on the federal ground therein relied upon. . . .

Bowe v. Scott, 233 U. S. 658, 663 (1914); *see also Radio Station WOW v. Johnson*, 326 U. S. 120, 128 (1945).

The Nevada Supreme Court denied the Petition for Rehearing using the following language: "Rehearing denied. NRAP 40(c). It is so ORDERED." The citation to NRAP 40(c) (quoted in part above) indicates that the Petition was denied on procedural grounds. A cursory denial of a petition for rehearing does not constitute a decision on the merits as to the federal questions raised in the petition. *Consol. Turnpike Co. v. Norfolk & O. V. Ry. Co.*, 228 U. S. 326, 333-334 (1913); *Forbes v. State Council of Viriginia*, 216 U. S. 396, 398-399 (1910).

Petitioner cannot claim that she was surprised by the Nevada Supreme Court's decision, as the trial court decided the issue regarding application of the covenant of good faith and fair dealing in exactly the same manner.

The law in Nevada concerning the implied covenant of good faith and fair dealing is not well developed and any reliance by the petitioner on the Nevada Supreme Court extending application of the covenant to her case under the particular circumstances was unreasonable.

> There is no constitutional right to have all general propositions of law once adopted remain unchanged. . . . that the supreme court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be though of the justice or wisdom of such a step, the Constitution of the United States is not infringed. . . . in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.

Patterson v. Colorado, 205 U.S. 454, 461 (1907).

The jurisdictional requirement that federal constitutional issues must be presented to and decided by the highest state court is not formal, but is rather grounded upon policy.

> [T]here are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

Webb v. Webb, 451 U.S. at 499. These policy considerations include comity, development of the record, identification of adequate and independent state grounds, and judicial economy. *Id.* at 499-501. These considerations indicate that the instant petition must be denied for lack of jurisdiction.

II.

The constitutional questions raised by the petitioner are not sufficiently substantial or important to warrant certiorari.

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Supreme Court Rule 17.1.

An important factor to consider is the presence of conflicting decisions on the federal questions asserted. *Id.* In this case, there is no conflict in authority and respondents are aware of no case, state or federal, which has decided any of the novel federal questions raised in the petition. *Cf. Trimble v. Seattle,* 231 U. S. 683 (1914).

Aside from a bare desire to have this Court consider her purported federal constitutional claims, petitioner only mentions two reasons:

1. "To clarify the confusion which has occurred among the states . . . as a result of the dismissal of the appeal in *Carter v. Hartenstein,* 401 U. S. 901 (1971)"; and

2. "[T]o review the decision of the Nevada Supreme Court to correct this obvious and unwarranted injustice."

Neither of these reasons is sufficiently "special and important" to warrant review.

A decision in this case would not function to clarify any confusion among the states as a result of the dismissal of the appeal in *Carter v. Hartenstein, supra.* As

petitioner notes in her brief, the confusion caused by *Carter* was due to this Court's dismissal of that appeal for lack of a substantial federal question. However, the confusion in the state courts does not relate to any federal constitutional issue, but rather concerns the precedential value of the dismissal, i.e., limited precedential value *vis a vis* a binding adjudication on the merits.

Granting the instant petition could not alleviate the confusion asserted by petitioner. This case comes before this Court on a petition for a writ of certiorari, not on an appeal. Moreover, as is apparent, the facts of the two cases are entirely different. The constitutional issues addressed in *Carter* involved the rationality of a statutory provision limiting liability for design and construction defects to a period of six years after completion of construction. The instant case involves the enforcement of an unambiguous cancellation clause in a commercial sublease between sophisticated parties, and the application of the implied covenant of good faith and fair dealing.

The application of an implied covenant in a lease agreement does not present a substantial or important federal question. *See Trimble v. Seattle,* 231 U. S. 683 (1914). The construction of a local contract under local law does not present a substantial federal question. *Black v. Cutter Laboratories,* 351 U. S. 292 (1956). This Court is reluctant, in the name of the Fourteenth Amendment, to substitute its judgment for that of a state court in a matter concerning local policy, especially with regard to a specific judicial determination in a specific case. *Drivers Union v. Meadowmoor Co.,* 312 U. S. 287, 294 (1941).

The other reason for this Court to grant review asserted by petitioner is "to correct this obvious and unwarranted injuistice." However, petitioner misapprehends the function of this Court. Review by certiorari is discretionary, and depends upon numerous factors other than the perceived correctness of the judgment below. *See United States v. Shannon*, 342 U. S. 288, 294-297 (Frankfurter, J., dissenting).

State courts have supreme power to interpret written and unwritten laws of the state. That a state court has rendered an allegedly erroneous decision on a question of state law, or overruled principles established by previous decisions on which a party has relied, does not confer jurisdiction on the United States Court. *Patterson v. Colorado*, 205 U. S. at 460-461; *Agins v. Tiburon*, 447 U. S. 255, 259, n. 6 (1980). Except in exceptional circumstances, the United States Supreme Court must accept as controlling decisions of the state courts on questions of local law, both statutory and common. *Amer. Ry. Exp. Co. v. Kentucky*, 273 U. S. 269, 272-273 (1927); *see also Reynolds v. Georgia*, 640 F. 2d 702 (5th Cir. 1981).

Whether the evidence presented in a case is sufficient to make out a state cause of action is a question of state law. *Amer. Radio Ass'n. v. Mobile S. S. Ass'n.*, 419 U. S. 215, 231-232 (1974); *see also California Liquor Dealers v. Midcal Aluminum*, 445 U. S. 97, 111-112 (1980). Petitioner has not raised a substantial or important federal question, but instead asks this court to review a question concerning an emerging state cause of action.

In addition, the federal questions asserted must be sufficiently meritorious to warrant consideration. *Equitable Life Assurance Soc'y v. Brown*, 187 U. S. 308, 311

(1902). *Zucht v. King,* 260 U. S. 174 (1922). Where the purported constitutional issues come to this Court in highly abstract form, as opposed to clean-cut and concrete, and without the benefit of refinement of the state law involved, this Court should not exercise jurisdiction. *Rescue Army v. Municipal Court,* 331 U. S. 549 (1947); *see also Wainwright v. City of New Orleans,* 392 U. S. 598 (1968) (Harlan, J., concurring).

Even if this Court were to decide the federal questions asserted by petitioner, the judgment of the Nevada Supreme Court would be unaffected. As to petitioner's purported claim for an unconstitutional impairment of contract, not only was this issue *never* raised in the state court proceedings, this contention is wholly without merit. Petitioner claims that her sublease agreement with Harrah's Club was impaired by the decision of the Nevada Supreme Court. However, this Court has stated that Article I, Section 10 of the United States Constitution does not apply to *judicial* impairment of a contract, as opposed to legislative impairment. It is well established that impairment by judicial decision does not raise a federal question. *Tidal Oil Co. v. Flanagan,* 263 U. S. 444, 451, n. 1 (1924); *see also Allied Structural Steel Co. v. Spannaus,* 438 U. S. 234, 257 (1978) (Brennen, J., dissenting).

Petitioner also claims that the decision of the Nevada Supreme Court denies her equal protection of the laws. However, it is clear that the decision was simply an application of state law to the particular facts of the case. There was no classification by the court; the decision merely affects petitioner's situation.

However, assuming the existence of a discrete class and an equal protection issue for argument's sake, there was no violation of the Fourteenth Amendment. Petitioner admits there is no fundamental issue at stake, and that any judicial classification need only be rational. "The role of the court is to determine whether the classification bears a rational relationship to the legislative purpose sought to be effected." Petitioner's Brief at p. 12, citing *Dandridge v. Williams,* 397 U. S. 471 (1970).

The legitimate purpose served by the Nevada Supreme Court's decision is manifest: certainty in commercial transactions. The effect of the decision is simply to bind petitioner to the express terms of the sublease agreement. This Court should require no citation of authority to support the proposition that certainty in commercial transactions is a legitimate purpose to be affected by classification.

Any distinction created between sophisticated commercial lessees and other contracting parties is completely rational. A sophisticated business person and attorney is simply not similarly situated with an unsophisticated contracting party with limited legal experience. Any such distinction recognizes that the element of reliance is a proper focus for the implication of a covenant of good faith and fair dealing in an otherwise unambiguous document. Indeed, it was this element of reliance which initially motivated some courts to recognize a cause of action based upon the implied covenant of good faith and fair dealing.

The Nevada Supreme Court also noted other reasons for its decision, which establish that petitioner is not similarly situated with other contracting parties. The can-

cellation clause at issue was unambiguous, and the subject of negotiations over a ten year period. Petitioner is not similarly situated with a party to an adhesion contract, such as a contract for insurance. The relationship between petitioner and Harrah's was that of sublessor/sublessee. It is rational to distinguish between this relationship and an ordinary sales contract, as a sublessor may require continuing control over the occupancy of the premises, unencumbered by an implied covenant contradicting the express terms of the sublease.

Petitioner stresses that "merchants" are entitled to the benefits of an implied covenant of good faith and fair dealing under the provisions of the Uniform Commercial Code. (Nev. Rev. Stat. Chapter 104). Of course, the Uniform Commercial Code does not apply to agreements concerning real property. If petitioner's analogy is to have merit, it must mean that she is arguing for an extension of the provisions of the Uniform Commercial Code to all contracts as a matter of federal constitutional law. If petitioner is correct in her assertion, that is arbitrary to treat commercial lessees differently than merchants of goods, would it not also be arbitrary to apply the provisions of the Uniform Commercial Code to sales contracts, while not applying them to service contracts? It is doubtful that the drafters of the Uniform Commercial Code, or of the Fourteenth Amendment, ever envisioned this area of contract law expanding into the realm of federal constitutional law.

Under the familiar "rational basis" test, this court will not attempt to decide on the wisdom and utility of the purported arbitrary classification, and it is clear that states need not "strike at all evils at the same time or

in the same way." *Minnesota v. Clover Leaf Creamery Co.*, 449 U. S. 456 (1981). Thus, the Nevada Supreme Court must remain free to decide each case on an individual basis, and to deal with the emerging doctrine of the implied covenant of good faith and fair dealing one step at a time.

For the foregoing reasons, it is respectfully submitted that the federal constitutional questions presented in the petition are not sufficiently important or substantial to warrant granting the Writ of Certiorari.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 22nd day of December, 1983.

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Attorneys for Respondents Harrah's

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APPENDIX A

Respondents' List of Parent, Subsidiary And Affiliated Corporations

Name

ADM, Inc.
Aerohotel, S. A.
Cambridge Hills Investment Company
Chicago Mart Plaza H.I., Inc.
Civic Center Development Corporation
Cove Lake Investment Company
Cumberland Investment Company
Delta Hotels Limited
Develco, Inc.
Dixie Realty, Inc.
Downtown Trenton Corporation
Eastland Catering Company
80 Operating Co., Inc.
Gateway Motels Corp.
General Data Corporation
General Innkeeping Acceptance Corporation
GIAC Leasing Corporation
Great Northern Realty, Inc.
Great Western Investment Co.
Griffin Gate Catering Company
Harrah's
Harrah's Atlantic City, A New Jersey Corporation
Harrah's Club
AIR Corporation
Harrah South Shore Corp.
Harrah's Middle Fork Charters, Inc.
Harrah's PTY Limited
Middle Fork Lodge, Inc.
The Palace Corporation
Harrah's-Holiday Inns, Inc.
Harrah's-Holiday Inns of New Jersey, Inc.
Harrah's New Jersey, Inc.
Harrah's Boardwalk, Inc.
Harrah's Service, Inc.

H.I. (Canada), Inc.
HI-Communications, Inc.
HI Chat-Lem, Inc.
H.I. Holdings, Inc.
H.I. (Ireland) Limited
HI JV 77750, Inc.
HI-NET Communications, Inc.
HIOA, Inc.
HI-Air, Inc.
H, M & G, Inc.
Holiday Clubs International, Inc.
Holiday Edwardsville Holding Co.
  Holiday South Lindbergh, Inc.
Holiday Inn-Caribbean, Inc.
Holiday Inn JV 67650, Inc.
Holiday Inn Mexicana S.A.
  Hipocampo, S.A.
Holiday Inn of Israel (1977) Ltd.
Holiday Inns (Andina), Inc.
  Hotelera Holiday Inns (Andina) Limitada
Holiday Inns Aruba N. V.

Holiday Inns Australia Pty Limited
Holiday Inns (The Bahamas), Inc.
Holiday Inns (Bahrain), Inc.
Holiday Inns (Belgium), Inc.
Holiday Inns (Bolivia), Inc.
Holiday Inns (Colombia), Inc.
Holiday Inns Continental, Inc.
Holiday Inns (Costa Rica), Inc.
Holiday Inns de Espana, S.A.
Holiday Inns (Egypt), Inc.
Holiday Inns (Far East Ltd.), Inc.
Holiday Inns Finance N. V.

Holiday Inns (France), Inc.
Holiday Inns (France) et Cie S.N.C.
Holiday Inns (Germany), Inc.
  Continental Motor Inns (Deutschland)

DUPA Hotelbetriebs-und Beratungsgesellschaft MbH
Holiday Inns von Deutschland GmbH
MAH Hotelbetriebs-und Beratungsgessellschaft MbH
Holiday Inns (Hong Kong), Inc.
Holiday Inns Hotels do Brasil Limitada
Holiday Inns do Brasil Participacoes e Gerenciamento de Hoteis Ltda.
Capital Center Hoteis S.A.
Holiday Inns (Indonesia), Inc.
Holiday Inns (Italy), Inc.
Holiday Inns (Jamaica), Inc.
Holiday Inns (Jeddah S.A.), Inc.
Holiday Inns (Jordan), Inc.
Holiday Inns (Kuwait), Inc.
Holiday Inns (Lebanon), Inc.
Holiday Inns Limited
Holiday Inns (Malaysia) Sdn Bhd
Holiday Inns (Middle East), Inc.
Holiday Inns (Netherland) N.V.
Holiday Inns (The Netherlands), Inc.
Netherlands International Hotels B.V.
Holiday Inns (Oman), Inc.
Holiday Inns (Paraguay), Inc.
Holiday Inns (Peru), Inc.
Holiday Inns (Peru) Management, Inc.
Holiday Inns (Philippines), Inc.
Holiday Inns (Saudi Arabia), Inc.
Holiday Inns (Sharjah), Inc.
Holiday Inns (Singapore), Inc.
Holiday Inns (South America), Inc.
C. A. Holiday Inn—VIHSA
Complejo Turistico La Sapoara, C. A.
Holiday Inns (Spain), Inc.
Holiday Inns (Thailand), Inc.
Holiday Inns (U. K.), Inc.
Holiday Inns of America, Inc.
Holiday Inns of America (U. K.) Limited

Holiday Inns of Belgium N. V.
Ghenthotel N. V.
Holiday Inns of Massachusetts, Inc.
Holiday Inns of Monaco, Inc.
Holiday Inns of Nevada, Inc.
Nob Hill Casino, Inc.
River Boat Casino, Inc.
Holiday-Casino, Inc.
Holiday Inns of New Mexico, Inc.
Holiday Inns of Tel Aviv Ltd.
Holiday Inns of the Bahamas, Limited
Holiday-Marina, Inc.
Holiday Restaurant, Inc.
Holiday Woodcraft, Inc.
Hoteles Y Turismo H. I. H., S. r. l.
Howlett Enterprises, Inc.
Indian Valley Realty Corp.
Industrial General Agency (Tenn.), Inc.
American Commonwealth Assurance
Company Limited
Industrial Realty, Inc.
Inn Keepers Supply, S. A. de C. V.
Inn Operations, Inc.
Denver Motor Hotels, Inc.
Downtown Topeka Motor Hotels, Inc.
Dubuque Motor Hotels, Inc.
Duluth Motor Hotels, Inc.
Johnson County Motor Hotels, Inc.
Kansas Super Motels, Inc.
Minot Motor Hotels, Inc.
Salt Lake City Motor Hotels, Inc.
Investors Development Co., Inc.
Rubert Investment Co.
Jan-Jan, Inc.
Junker Realty Corp.
Kansas Super Motels of North Dakota, Inc.
Ken-Hills Investment Company
La Societe Developpement et Gestion
Hoteliere de Strasbourg, S. A. R. L.
MHI, Inc.

Marshall Motels, Inc.
Midtown Investment Company
Millcreek Investment Company
Milwaukee North, Holiday Inns, Inc.
Milwaukee South, Holiday Inns, Inc.
Motels Development Corporation
National Inns, Inc.
New South Furniture Exposition Corporation
Northeast DeSoto Utility Company
Northern Hills Realty, Inc.
Ohio Hills Investment Company
Olive Branch Corp.
Omega Hotels Limited
Park Hills Investment Co.
Perkins Restaurants, Inc.
Pipers Restaurants, Inc.
Porter Elco, Inc.
Queensgate Investment Co.
Rainbow Springs Corporation
Rich-Hills Operating Company
Riverfront Investment Co., Inc.
S. B. Liquidating, Inc.
Shadeland Development Corp.
Tak How Investment Limited
Tex-Ken, Inc.
The St. Louis Chair Company
Town Park Hotel Corporation
Two Two One One Market Street Operating Co.
2211 Market Street Redevelopment Corporation
Warren Hills Investment Company

Respondents' List of Affiliated Joint Ventures

HI-GBN
1355 N. Harbor Drive
San Diego, California 92101

Rainbow Springs Joint Venture
6600 Southwest 57th Ave., Suite 2
Miami, Florida 33143

Holiday-GSL Joint Venture
2045 Kalakaua Avenue
Honolulu, Hawaii 96815

Wolf Point Hotel Joint Venture
400 East Randolph St.
Chicago, Illinois 60601

Holiday Waikiki Venture
345 Queen Street, Suite 400
Honolulu, Hawaii 96813

Marina Associates
1725 Brigantine Blvd.
Atlantic City, New Jersey 08401

HI-Chat-Lem/Iowa-New Orleans Venture
Dauphine and Bienville Streets
New Orleans, Louisiana 70112

Holiday Mills House Venture
115 Meeting Street
Charleston, South Carolina 29401

Harrah's Associates
Mississippi Avenue & Boardwalk
Atlantic City, New Jersey

HI-Thomas Circle Venture
3742 Lamar Avenue
Memphis, Tennessee 38195

HI/JC Venture
300 Poydras Street
New Orleans, Louisiana 70130

HI-C Street Management Venture
3742 Lamar Ave.
Memphis, Tennessee 38195

Holiday Inn-Crystal City
1401 S. Eads St.
Arlington, Virginia 22202

APPENDIX B

Respondents' Statement of The Case
And The Facts To The
Nevada Supreme Court

A. NATURE OF CASE

Nada filed her Third Amended Complaint on April 3, 1981 (Vol. IV 1056-1084). Nada in her brief refers to six separate counts or claims (AOB, p. 2). An analysis of the complaint reveals that there are five separate claims which can be characterized as follows:

(1) Tortious breach of contract;

(2) Unfair competition;

(3) Defamation;

(4) Tortious interference with prospective business advantage;[5] and

(5) Misrepresentation.[6]

B. DISPOSITION

The case proceeded to trial before a jury on the Third Amended Complaint. At the conclusion of the plaintiff's case, the court dismissed Dixon pursuant to NRCP 41(b). At the conclusion of the case, the court dismissed Sheppard and Contois and the claims of tortious breach of contract, unfair competition and defamation pursuant to NRCP 50(a). The dismissals were proper. The other

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[5] The claims of tortious interference with prospective business advantage and misrepresentation were submitted to the jury.

[6] The Opening Brief describes this claim as false and fraudulent representations. For ease of discussion, this claim will be referred to as "misrepresentation."

claims were submitted to the jury together with an instruction as to punitive damages. The jury returned a unanimous verdict in favor of the respondents. (Vol. IX RT 1116-1117).

C. APPELLANT'S STATEMENT OF THE CASE

The appellant's statement of the case in her opening brief contains a number of inaccurate, incomplete, or misleading statements as to the record on appeal which warrant a separate discussion.[7] The misstatements are as follows:

(1) Nada states that she filed a First, Second and Third Amended Complaint against Holiday, Smith and others. (AOB, p. 1).

Holiday was not a party defendant in the First Complaint (Vol. I 1-8, 128-139).

Smith was not a named defendant in the Second Amended Complaint (Vol. III 667-679). Nor was he a named defendant in the Third Amended Complaint. (Vol. IV 1056-1084).

(2) Nada states that Harrah's Club and Harrah's merged with Holiday (AOB, p. 2).

The record reflects a merger agreement between Harrah's and Holiday, not Harrah's Club (Vol. III 800-818).

(3) Nada asserts that the premises were leased to her by Harrah's and Harrah's Club (AOB, p. 2).

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[7] Other inaccuracies are found in appellant's brief which will be discussed later.

The record reflects that each lease agreement was executed solely by Harrah's Club (Exhibits "D", "E", "G", "I", and "J"). Harrah's is a separate corporation from Harrah's Club (Vol. VIII RT 582-585), and not a party to the leases.

(4) Nada states that the defendants filed their answer to the Third Amended Complaint (AOB, p. 2).

While technically the statement is accurate, it is misleading in that on page 1 of her brief she identifies Smith as a party defendant. Smith was not a defendant and did not file an answer to that complaint.

(5) Nada states that the defendants moved for a directed verdict at the close of the case pursuant to NRCP 50(a). (AOB, p. 3).

This is incorrect. Smith did not seek a directed verdict. He was dismissed from the action before the trial commenced. (Vol. III 654-655, 683). Dixon did not seek a directed verdict at the close of the case. Dixon was dismissed at the conclusion of the plaintiff's case pursuant to NRCP 41(b). (Vol. VIII RT 883:29-884:1, 891:10).

(6) Nada states that the court dismissed Dixon, Smith and others referring this Court to RT 1002 and Vol. V 1340-45.[8] (AOB, p. 3). This is not true. Page 1002 of the reporter's transcript does not mention or identify either Dixon or Smith.

The Order and Judgment of Dismissal found at Vol. V 1340-1342, is a dismissal as to Dixon. That order does

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[8] It is suggested by the brief that both Dixon and Smith were dismissed pursuant to NRCP 50(a). The inaccuracy of this suggestion has previously been discussed.

not mention or concern Smith. The order found at Vol. V 1343-1345 involves neither Dixon nor Smith.

IV.

STATEMENT OF FACTS

A. INTRODUCTION

There were material issues of facts submitted to the jury. The evidence presented by the appellant and respondents on these issues was diametrically opposed.

Appellant's Statement of Facts fails to identify those material issues, which were in dispute. Nor does she recite the testimony of any other witness which was inconsistent with hers. (AOB, pp. 4-22). It should be noted that (1) the facts recited by Nada are for the most part based upon her testimony, and (2) references are made by Nada as to what various respondents said, but this information on many occasions is not based upon what Dyer, Sheppard, Stevens or Poore testified to, but *what Nada testified they said.* (*Ibid.*) Nada's testimony on material issues was not consistent with the actual testimony of the respondents.

The statement of facts should be complete. The material issues in dispute and the inconsistent testimony should be identified. The incompleteness of Nada's facts requires a detailed discussion of the facts by the respondents.

B. THE CONTRACT

Nada has asserted a claim of tortious breach of contract. The contract in issue was a 1978 lease. That contract was not breached by the respondents.

The subject matter underlying this action was a leasehold interest in the Byington Building, located at the corner of Second and Virginia Streets in downtown Reno. (Vol. VII 130-132; Exhibit "I").

The Byington Building was owned by the heirs of the Byington Estate and was leased to Harrah's Club[9] in 1958 for a 20-year term. (Vol. VII 153:17-30, 256-259; Exhibit "R").

1968 Lease

A portion of the Byington Building was initially sublet by Harrah's to Nada and her late husband[10] by a lease dated January 16, 1968, ("1968 Lease") (Exhibit "D".

The 1968 Lease was for a 5-year term commencing February 1, 1968 and ending January 31, 1973, "unless sooner terminated as hereinafter provided" (Exhibit "D", para. 2). Two methods of termination were reserved to Harrah's by the terms of this lease: (1) Upon 15 days written notice in the event of default in payment of rent or the performance of obligations on the part of Nada (*Id.*, para. 19), and (2) upon 90 days written notice by Harrah's (*Id.*, para. 24).[11]

The cancellation clause provided:

> "The Lessor shall have the option to cancel this Lease upon ninety (90) days' written notice to the Lessees."

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[9] Hereinafter referred to as Harrah's unless otherwise indicated.

[10] Mr. Aleuvich died on October 16, 1971, (Vol. VII RT 158). The lessees will be referred to as Nada.

[11] Hereinafter referred to as the "cancellation clause."

This clause is the focus of this action. The cancellation clause is clear, unambiguous, unconditional and absolute. While Nada contended at the trial and now asserts on appeal that the cancellation clause was conditional, i. e., the option to cancel could only be exercised if she were a bad tenant or if Harrah's intended to use the premises for unrestricted gaming (AOB, pp. 10-15), the 1968 Lease contains no such limitations or conditions. (Exhibit "D").

It was contemplated by the parties that Nada intended to make certain initial alterations and permanent improvements to the premises (*Id.*, para. 15). In the event the option to cancel was exercised by Harrah's, Harrah's was to pay to Nada the unamortized portion of the initial improvements, based upon the number of months remaining under the lease. (*Id.*, para. 24). No similar provision is found in the lease if the lease were cancelled due to default. (Exhibit "D").

2. The 1970 First Amendment to 1968 Lease

The 1968 Lease was amended on February 24, 1970, ("1970 First Amendment") (Exhibit "E"). Under the terms of the 1970 First Amendment, Nada leased additional space in the Byington Building (*Id.*, para. 1). With reference to the additional space, it was contemplated that Nada would make initial alterations and improvements. Further, as to such expenditures, it was provided that if Harrah's "exercised its privilege to cancel the lease" as provided in paragraph 24 of the 1968 Lease, Harrah's would repay to Nada the unamortized portion of such costs, but if the lease were "terminated for any cause" except cancellation under paragraph 24, Harrah's would

not be obligated to repay to Nada the unamortized costs. (*Id.*, para. 3).

The cancellation clause was not modified by the 1970 First Amendment. (Exhibit "E").

The 1968 Lease and 1970 First Amendment clearly demonstrate that Harrah's had the unconditional right to cancel the lease on 90 days' notice with or without any reason, but if Harrah's did so, it would have to repay to Nada the unamortized costs for initial improvements. On the other hand, Harrah's also had the right to cancel "for cause" under the Default clause (*Id.*, para. 19) on 15 days' notice (e. g., if Nada was a bad tenant). If the cancellation were for cause, Harrah's would *not* be obligated to repay to Nada any of the costs for initial improvements. The manifest fairness and purpose of the distinction is obvious.

3. 1973 Lease

The 1968 Lease provided that if Nada desired to renew her lease with Harrah's, she was to give Harrah's a notice of "intent to seek renewal" not less than 90 days before the expiration of the term of the 1968 Lease. If Harrah's agreed to a renewal, the parties were to negotiate the terms of the renewal, which was to be reduced to writing. (Exhibit "D", para. 32).

On September 27, 1972, Nada notified Harrah's of her intent to renew the lease for the Byington Building premises. (Exhibit "F").

Thereafter, Harrah's relet to Nada[12] the lower level

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[12]Nada is the only lessee, Mr. Aluevich having died on October 16, 1971.

of the Byington Building by a lease dated March 1, 1973 ("1973 Lease") (Exhibit "G"). The term of the 1973 Lease was 5 years, commencing March 1, 1973 and ending February 28, 1978, "unless sooner terminated as hereinafter provided." (*Id.*, para. 2).

Like the 1968 Lease, the 1973 Lease contained a cancellation clause which provided in part:

> "24. *Cancellation.* The Lessor shall have the option to cancel this Lease upon ninety (90) days' written notice to the Lessee." (*Id.*, para. 24).[13]

The cancellation clause is absolute and unconditional. The language is identical to the language which appeared in the 1968 Lease.[14]

The 1973 Lease generally contained the same language as the 1968 Lease. The language relative to alterations and renewal was modified somewhat. It was contemplated that Nada intended to make certain alterations and improvements at the commencement of the lease term. Those improvements had to be made not later than December 31, 1973. (*Id.*, para. 15). As to such alterations or improvements, paragraph 24 provided that Harrah's would pay to Nada the unamortized costs if Harrah's exercised the option to cancel the 1973 Lease. As in the 1968 Lease, if the lease was terminated for any cause except cancellation under paragraph 24, Nada was not entitled to be paid for the unamortized costs of alterations or improvements. (*Id.*, para. 24).

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[13]Hereinafter referred to as the "cancellation clause."

[14]The word "Lessees" was changed to "Lessee."

Again, as in the case of the 1968 Lease, the 1973 Lease did not impose any conditions or restrictions on Harrah's as to the exercise of the option to cancel the 1973 Lease. Specifically, it did not provide that the cancellation clause could only be exercised if Nada ware (sic) a bad tenant or if Harrah's intended to use the premises for gaming. (Exhibit "F").

As to renewal, the time for giving notice of intent to seek renewal was extended to 6 months. In all other respects, the renewal language was identical to that in the 1968 Lease (Exhibit "F", para. 32; Exhibit "D", para. 32).

4. 1978 Lease Renewal

On June 30, 1977, Nada notified Harrah's of her intent to renew the 1973 Lease in accordance with paragraph 32 of that Lease (Exhibit "H").

Thereafter, Harrah's relet the same premises to Nada as evidenced by a Lease Renewal dated March 1, 1978. ("1978 Lease Renewal") (Exhibit "I"). The 1978 Lease Renewal provided that the 1973 Lease was renewed for a term of 5 years, commencing on March 1, 1978 and ending on February 28, 1983, on the "same terms, conditions, covenants, and agreements" as contained in the 1973 Lease, except as modified by the 1978 Lease Renewal. (Exhibit "I", para. 2). A copy of the 1973 Lease was attached to the 1978 Lease Renewal as Exhibit "A". (*Id.*, para. 1).

The pertinent modifications were:

(1) Rental was to be based on a percentage of gross sales rather than a fixed monthly rental. (*Id.*, para. 3);

(2) Alterations or improvements by Nada were not contemplated. No alterations or improvements were to

be made by Nada without first obtaining the written consent of Harrah's. (*Id.*, para. 5).

(3) If Harrah's cancelled the lease as provided in paragraph 24, Harrah's would pay to Nada the unamortized cost of approved leasehold improvements made during the renewal term as provided at paragraph 5 of the 1978 Lease Renewal. Again, if the 1978 Lease Renewal was terminated other than pursuant to paragraph 24, Nada was not entitled to be paid such unamortized lease improvements. (*Id.*, para. 6).

(4) As to renewal, it was provided that Nada "shall have no option to renew the Lease for any further term." (*Id.*, para. 8).

The cancellation clause remained intact and still provided: "The Lessor shall have the option to cancel this Lease upon ninety (90) days' written notice to the Lessee." (Exhibits "I", "G"). No conditions or limitations were imposed as to the exercise of the cancellation clause. (*Ibid.*)

The 1978 Lease Renewal contained an error as to the gross sales minimum base, which was corrected by a Modification of Lease dated May 31, 1978. (Exhibit "J").

On October 2, 1978, pursuant to 1978 Lease Renewal, Harrah's delivered to Nada a Notice of Cancellation[15] (Vol. VII RT 185; Exhibit "L"), which provided:

> "Notice is hereby given that the Lease between you as Lessee and Harrah's Club, a Nevada corporation, as Lessor dated March 1, 1973, as renewed by

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[15]Hereinafter referred to as "cancellation notice."

'Lease Renewal' dated March 1, 1978, and as amended by 'Modification of Lease' dated May 31, 1978, shall be cancelled pursuant to Section 24 thereof pertaining to the rights of cancellation of the parties to the Lease, effective January 1, 1979. The Lease is for demised premises located in the Byington Building, Second and Virginia Streets, Reno, Nevada." (Exhibit "L").

The effective date of the cancellation was to be January 1, 1979. However, thereafter, on December 11, 1978, to accommodate Nada's business requirements, the effective date of cancellation was extended by Harrah's to February 28, 1979. (Exhibit "M"; Vol. VII RT 192).

On February 28, 1979, Nada vacated the Byington Building. (See Vol. VII RT 151.)

Nada asserted that respondents breached the 1978 Lease Renewal by exercising the cancellation clause on October 2, 1978. This assertion is based upon parol evidence inconsistent with the plain and clear language of the contract. Parol evidence may not be introduced to modify the 1978 Lease Renewal, thus, the directed verdict by the trial court on the breach of contract issue was proper.

C. THE CLAIM OF MISREPRESENTATION

The issue of misrepresentation was submitted to the jury. There were numerous genuine issues as to material facts, which disputed facts were not identified in Navada's brief. The jury resolved those issues in favor of the respondents.

1. The 1968 Lease

Nada and her late husband operated a business under the name of Luke's Gift Shoppe and Luke's Nevada Photo

("Luke's"). Luke's was relocated in the Byington Building in 1968 after Nada and Harrah's entered into the 1968 Lease (Vol. VII RT 152).

In the summer of 1967, Nada contacted Dyer relative to leasing the Byington Building (Vol. VII RT 153). At that time Dyer was vice-president of real estate and finance of Harrah's, and was authorized to negotiate leases on behalf of Harrah's (Vol. VII RT 255). In 1975 Dyer became president of Harrah's (*Id.*, RT 281), which title he held until February, 1980 (Vol. VIII RT 637).

Nada, a lawyer since 1950 (Vol. VII RT 150-151), possessed expertise in the field of real estate, having drafted leases, documents and deeds of trusts, and having been involved in business and real estate litigation, and appellate practice, and she was also an experienced businesswoman (Vol. X 1-10).

Nada negotiated the 1968 Lease with Dyer. Nada asserts that Dyer told her there would be a cancellation clause and further represented that the cancellation clause would *only* be exercised if she were a bad tenant or if Harrah's intended to use the premises for unrestricted gaming (AOB, pp. 10, 12, 29, 30; Vol. VII RT 173-174). While Nada did so testify at the trial, her brief fails to mention that Dyer denied ever making such statements.

Dyer testified that before the 1968 Lease was entered into he did *not* tell Nada that the cancellation clause would only be exercised (1) if she were a bad tenant, or (2) if Harrah's could get unlimited gaming at that location (Vol. VII RT 307:23-308:5, 339:17-23). Further, on examination by Nada, he testified as follows:

"Q. You only told me, did you not, sir, that the only reason that the cancellation clause was in there was if I were a bad tenant?

A. *No.*

Q. And if you could put in unlimited gaming in there?

A. *No.*

Q. You didn't say that?

A. *Absolutely not.*

Q. *You deny that?*

A. *I do.*" (Vol. VII RT 332:8-17, emphasis added).

In her brief, Nada states that Dyer advised her that the cancellation clause was in the lease for "one reason", that if she ran a junk shop, the lease would be cancelled, referring this Court to her own testimony and an incomplete portion of Dyer's deposition (AOB, pp. 10-11). Nada has again failed to provide this Court with the complete testimony of Dyer on this subject.

Dyer testified that was *one* of the purposes for the cancellation clause (Vol. VII RT 268:3-13), but he also testified there were other reasons. Harrah's wanted to maintain flexibility for future control or use of the premises (*Id.*, 316:3-320:17).

Nada refers to a *portion* of the testimony of Dyer taken from his deposition (AOB, pp. 10-11), asserting that Dyer testified that only one reason existed for the cancellation clause. Unfortunately, Nada has again failed to provide the court with Dyer's complete testimony as it appeared in the deposition and was presented at the trial.

Nada refers to the deposition testimony of Dyer[16] attempting to assert that the cancellation clause would only be exercised if she were a bad tenant. But she failed to inform this Court that:

(1) When she asked Dyer if that was his testimony when his deposition was taken, she would not allow him to explain that it was not all of his testimony on the subject (Vol. VII RT 269:27-270:20).

(2) Following the recited testimony from the deposition, Dyer stated there were other reasons, including maintaining flexibility with reference to the use of the property (*Id.*, RT 270:21-271:6) and for a possible exchange of the property for the First National Bank property, contiguous to Harrah's, so that Harrah's could expand to the Bank property (*Id.*, 270-272).

(3) When she asked Dyer if only two reasons were given in the deposition, to wit: If she were a bad tenant, or if the Bank were placed there, Dyer responded, "No" (*Id.*, 272:15-22).

(4) It was not until respondents' cross-examination of Dyer that the complete testimony from the deposition was presented, which consisted of the answers given by Dyer immediately following the statements quoted by Nada in her brief at pages 10 and 11 (*Id.*, RT 316:3-320:17). In the balance of the deposition testimony, Dyer stated Harrah's wanted flexibility to use the premises for gaming or something else, or future use, and concluded by saying: "But the point I'm trying to make is that we want

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[16]The testimony commences at line 11, page 32 of the deposition (Vol. VII RT 316:3-320:17).

the cancellation clause, wanted it in your building and other places, in case we have a future use and we want to be able to move." (*Id.*, 320:8-12).

Additionally, on examination by Nada, Dyer was asked to explain what he meant by flexibility, and he responded that Harrah's wanted the right to terminate any lease, the right to change a tenant, put in a different business, or to expand gaming (*Id.*, 330:3-14). In summary he testified: "I am saying that we wanted the flexibility in all of our leases to control our properties and do what we wanted with them, not knowing, perhaps, what a future use might be." (*Id.*, 336:7-10).

2. Cancellation Clause

The unconditional cancellation clause and its purpose had an historical basis. The Byington Building was leased by Harrah's from the Byington Estate on December 30, 1958 ("Byington Lease"). The term of the lease was 20 years, expiring on December 31, 1978. (Exhibit "R").

Part of the Byington Building leased to Nada in 1968 had been previously leased to Folk & Campbell under a lease commencing September 1, 1959 ("1959 Lease") (Exhibit 6a), and a lease dated November 6, 1964 ("1964 Lease") (Exhibit 6b). Both leases were prepared by Dixon, as counsel for Harrah's. Both leases contained cancellation clauses, which were also prepared by Dixon and which read as follows (Vol. VIII 620:28-622:5): "This Sub-Lease may be terminated by Lessor by ninety (90) days' written notice to Lessees." (Exhibit 6a, para. 22, Exhibit 6b, para. 22).

Dixon also prepared the 1968 Lease and the cancellation clause found at paragraph 24 (Vol. VIII RT 622). Before the 1968 Lease was signed, Dixon discussed the provisions of paragraph 24 with Nada (*Id.*, 623:23-28). Dixon had been instructed to prepare the lease with a cancellation clause. He was concerned that Nada would be putting improvements on the premises, so he talked to Nada concerning an amortization clause. Dixon explained that if Harrah's cancelled her lease, she would be protected by getting back the unamortized costs. Thereafter, the lease was signed by Nada, with the cancellation clause and the amortization clause. (*Id.*, 623:23-627:4).

Dixon explained that Mr. Harrah was not in the leasing business, and he wanted to maintain the freedom to pursue his business purposes, and thus wanted the flexibility to cancel any lease. Harrah's wanted to make sure that it could cancel Nada's lease as it could have cancelled Folk & Campbell's, with or without any reason. The purpose of the cancellation clause drafted by Dixon was to reserve to Harrah's the unconditional right to cancel the lease on 90 day's written notice. (Vol. III RT 632-635).

3. 1977 Negotiations

On June 30, 1977, Nada gave notice to Harrah's of her intention to renew the 1973 Lease. Thereafter, Nada met with George Poore on September 9, 1977 (Vol. VII RT 168). Poore was the Director of Purchasing and Materials Management for Harrah's (*Id.*, RT 360). As to the meeting of September 9, 1977, Nada in her brief asserts that Poore told her that Harrah's was considering putting in its own gift shop in the Byington Building, that Poore questioned her about merchandising of Lukes; that Poore asked her for her gross and net revenue figures for

Luke's; and that she refused to provide the figures (AOB, p. 8). The foregoing is based upon Nada's testimony, not Poore's.

Poore testified that his supervisor had informed him that Nada's lease was to expire. Poore was instructed to evaluate the space on the corner and to make a recommendation as to the operating future of the location. (Vol. VII RT 364, 367-368). He was also instructed to contact Nada and to start negotiating a new lease. (*Id.*, RT 367). On the meeting of September 9, 1977, Poore informed Nada her lease was about to expire and that Harrah's was considering the corner for several enterprises, including a bank, an ice cream store, McDonalds, a liquor store, a gift shop, without identifying any operator, and other possibilities. (*Id.*, 368-369). Poore discussed with Nada that Harrah's "main objective was to establish the market value of the *space*", other people were interested in the space, the going rental rate for gift shops was "10% of the gross with a per square foot minimum," Harrah's needed to know Nada's gross to evaluate whether the space for a gift shop versus another type business would be in the best interest of Harrah's, and the space was under consideration for other uses but no definite direction had been set. (Exhibit "Y", emphasis added.) Nada refused to provide her gross figures. (Vol. II RT 369). Nada's lease was to expire on February 28, 1978, unless renewed. (Exhibit "G").

On September 30, 1977, Nada again talked to Poore concerning a new lease, at which time Poore again requested her gross figures. (Vol. VII RT 176, 376). Poore stated that the importance of Nada's gross figures was to establish a lease value for the corner and to establish a minimum rent for Nada's new lease. (Vol. VII RT 373:

19-22). Nada refused to provide the figures and said she was going to see Dyer. (*Id.*, RT 177, 377).

On October 10, 1977, Nada met with Dyer. (*Id.*, RT 177). Dyer stated that he wanted to renew the lease, the only problem being rent. (*Id.*, RT 290). Thereafter, Nada again met with Poore on November 9, 1977. (*Id.*, RT 377). Don Stevens, the treasurer and controller of Harrah's was also present at that meeting. (*Id.*, RT 178, 179, 377).

4. Harrah's 1977 Projections

Stevens monitored all leases. He knew that Nada's lease was due for renewal. As controller of Harrah's, he thought that he should give his input as to the possibilities for the Byington corner. (Vol. VII RT 378). Stevens prepared an analysis of several possible alternatives for utilizing the space on the corner.[17] (Exhibit "V" and Exhibit "W").

Nada asserts that the purpose of Stevens' analysis as contained in the 1977 Projections was to take over Luke's and when she met with Stevens, she did not know Stevens was making projections. (AOB, pp. 12, 13).

To the contrary, the record reflects:

(1) Nada testifies she learned of the 1977 Projections from Stevens on November 9, 1977 (Vol. VII RT 231:7-24).

(2) The 1977 Projections were prepared by Stevens on his own and were his forecast as to the potential of the corner (Vol. VII RT 437, Vol. VIII RT 456).

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[17]The analysis is set forth in a memo dated October 27, 1977 (Exhibit "V"), which was revised on November 8, 1977 (Exhibit "W"), the day before Nada met with Stevens. The analysis will hereinafter be referred to as the "1977 Projections."

(3) The projections related to the corner or the space in contrast to Luke's (Vol. VIII RT 448), and were based upon operations within Harrah's (Vol. VII, RT 295-296; Exhibits "V", "W").

(4) Stevens recommended that Nada's lease not be renewed and that Harrah's maximize its return by putting a retail establishment operated by Harrah's on the corner. (Vol. VIII RT 448-452, 471-473, 480). It was not his concern as to what form the establishment took. Any decision not to renew the lease or as to what was to be placed on the corner, was to be made by other management people. (*Id.*, RT 472, 479-480, 482; Exhibit "Z").

(5) At the meeting of November 9, 1977, Nada told Stevens her margin on the camera store as opposed to the gift shop was low and she could not afford to pay a rent based on 10% of gross. (Vol. VII RT 224, Exhibit "Z"). Stevens believed a lease of the premises should be based on 10% of revenue (Vol. VIII RT 461). Because of Nada's statement, Stevens requested gross and net figures for a proper evaluation of the potential lease. (*Id.*, RT 461-462). Nada again refused to provide her figures, and said she would talk to Dyer and Mr. Harrah. (Exhibit "Z").

(6) Stevens' recommendation not to renew the lease was not accepted by management (Vol. VIII RT 480), and after the lease was renewed, he did not participate in the decision to cancel the 1978 Lease Renewal (*Id.*, RT 467).

The record fails to reflect any other involvement on the part of Stevens between the meeting of November 9, 1977, and the renewal of Nada's lease in March of 1978.

5. Representation of Poore

While Poore was provided with copies of the 1977 Projections, he did not work with Stevens in preparing the projections and did not know why they were being prepared (Vol. VII RT 381).

After November 9, 1977, Poore told Nada he needed her revenue figures in order to complete the evaluation of the corner and that a minimum rent could not be set nor could the lease be renewed without them (*Id.*, RT 389-391). Nada told Poore she would get back to him in a couple of weeks (*Id.*, RT 391).

Thereafter, Nada did get back to Poore. Nada asserts that during this subsequent discussion Poore made certain misrepresentations relative to the purpose and exercise of the cancellation clause and the use of her gross revenue figures. (AOB, pp. 11, 12, 14, 15, 28, 29, 30). Again, Nada's brief fails to mention that Poore's testimony on these matters was different from Nada's.

Furthermore, the quotations appearing at page 11 of Nada's brief concerning Poore are taken out of context and do not accurately represent either the record or Poore's testimony. There, Nada states: "Likewise in his *deposition* on November 5, 1979, defendant Poore was asked by plaintiff who was acting as her own counsel." (Emphasis added.) Following this statement she quotes a question, referring the court to page 75 of the deposition and to page 393, lines 13-14 of the transcript. Following the question she quotes an answer suggesting that this was the answer Poore gave to the previous question.

The record fails to identify the quoted question as having come from page 75 of Poore's deposition. As a matter of fact, the record does not even reflect that any

portion of page 75 of Poore's deposition was admitted into evidence (Vol. VII, RT 383:13-15).

The quoted question was, in fact, asked by Nada during the trial, but the answer to the question of whether Harrah's only intended to be bound for 90 days under the lease was not the one quoted in Nada's brief, and further, was not taken from Poore's deposition (AOB, p. 11). The answer given to the question was: "That's what you were concerned about, that you were only signing a 90 day lease, yes." (Vol. VII RT 383:16-17) Nada again asked a similar question, and Poore responded: "I knew it, and you knew it" (*Id.*, 393:18-21).

The quoted answer appearing at the bottom of page 11 of Nada's brief is also misleading. Nada refers this Court to page 394 of the transcript. This Court should note that the record reflects that Poore did *not* testify as quoted by Nada. (Vol. VII RT 394) The record reflects that commencing at line 18 of page 394 an argument ensued between counsel as to whether Nada was reading Poore's *complete* answer as taken from the deposition. The complete answer when finally presented to the jury reflected that Poore testified:

> "*I'm not sure.* It was in there for the reason that I said. It was in there because—for the protection of Harrah's is the only reason that I know of that it was in there. ***But whether that 90 day clause has additional information to it, I would have to read the lease. Other than what it says in the lease I didn't make any representations to her other than what the lease says.***[18]
>
> (Vol. VII RT 395:10-396:9).

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[18]The portion of the answer omitted by Nada at page 11 of her brief is underlined.

As to Poore's discussion with Nada after November 9, 1977, his testimony differs from Nada's. Following the meeting of November 9, 1977, Poore had a telephone conversation during the early part of December of 1977, at which time she provided Poore with her gross revenue figures. (Vol. VII RT 419:6-422:12, Exhibit "S". Poore immediately called his supervisor, George Drews ("Drews") and reported the figures to him. Drews called back and told Poore to proceed with the lease based upon a 10% of gross revenue and a minimum rental. Poore notified Nada of Harrah's decision (*Id.*, RT 422-423, 361).

Nada requested that the 90-day cancellation clause not be included in the new lease. Poore informed her that he would take up her request with Mr. Franklin, Harrah's in-house legal counsel. Poore reported the request to Franklin, who said "No, its Harrah's policy to have cancellation clauses in their leases." (*Id.*, RT 409: 14-15). Poore thereafter informed Nada that the cancellation clause would not be removed from the lease. (*Id.*, RT 392-393; 409)

Poore's testimony also differs from Nada's as to whether any representations were made by him to her concerning the cancellation clause before the 1978 Lease Renewal was signed. Poore testified Nada knew she was only signing a 90-day lease, and that he did not assure Nada the cancellation clause would only be exercised under the same conditions as the old lease. (*Id.*, RT 393)

Poore made no representations to Nada concerning the cancellation clause or when it would be exercised.

(*Id.*, RT 408-409). While Poore had a personal opinion as to why the cancellation clause was included in the 1978 Renewal Lease (*Id.*, RT 407), he explained that the "reason for the cancellation clause" came through the legal department who prepared the lease, and that he made no decisions in regards to the cancellation clause (*Id.*, RT 412-413, 405-408).

As to any representation as to Harrah's exercising the cancellation, Poore said: "I couldn't make a statement as to when or why it would be exercised. This is a right that Harrah's had in the lease. As to when or why it would or would not exercise it, I had no way of judging that." (*Id.*, RT 406:13-16)

After talking to Nada, the lease was prepared by Harrah's counsel with the cancellation clause (Vol. VII RT 423; Exhibit "I"). After the lease was signed, Poore had no further involvement. He did not participate in the decision to cancel the 1978 Lease Renewal and did not learn of the cancellation until he read of it in the newspaper after October 2, 1978. (Vol. VII RT 424)

6. Renewal and Cancellation

Stevens had recommended in November, 1977, that the 1973 Lease, which was due to expire on February 28, 1978, not be renewed. (Vol. VIII RT 480).

Stevens' recommendations were rejected by Dyer and the lease with Nada was renewed. Dyer explained that the decisions as to whether Harrah's would renew the lease or place a gift shop at the location in 1977 were his, Harrah's did not intend to put a gift shop at that location at that time, and that the lease with Nada was renewed. (Vol. VII, RT 290-291, 297, 308-309).

Nada quotes statements of Drews and Andreotti to the effect that in 1977 they did not know why the 1973 Lease was renewed in 1978. (AOB, pp. 13-14). She suggests that such answers imply something improper. She fails to mention, however, that the record is barren of any evidence that either Drews or Andreotti participated in the decision to renew the lease. Nor is it mentioned that Dyer *alone* made that decision. (Vol. II, RT. 290-291, 297, 308-309).

The 1978 Lease Renewal was signed on March 1, 1978. On October 2, 1978, Harrah's delivered to Nada a notice of cancellation of the 1978 Lease Renewal. (Exhibit "L"). The decision to cancel was made by Dyer and only Dyer. While Nada states that the decision was made by the Board (AOB, p. 16), Dyer stated that Harrah's Board and the other defendants were not involved in the decision. (Vol. VII RT 288, 297, 352). Dyer explained his reasons for cancelling the lease to be:

(1) The pretax earnings had dropped substantially in the period between March, 1978 and September, 1978, in comparison to the same period of time in 1977 (Vol. VII RT 308-312; 342).

(2) Dyer asked Stevens to prepare a schedule of Harrah's earnings for the period from March, 1978 through September, 1978 (*Ibid.*) (Exhibit 4).

(3) Exhibit 4 showed that the earnings had dropped as follows: March, 1%; April, 44%; May, 25%; June, 24%; July, 11%; August, 2%; and September, 17%. (Vol. VII RT 311).

(4) Because of the drop in earnings and in an effort to increase earnings, Dyer in July, 1978, asked his people

to prepare a projection on the Byington location. A projection was prepared by George Akmon on July 27, 1978 (Exhibit "DD") ("1978 Projection").

(5) The 1978 Projection used the same figures recited in the 1977 Projections prepared by Harrah's, but also added gaming. The pretax figures for the slot machines alone was $800,000. The after-tax profit for slots, a gift shop and pinball games was $600,000. (Vol. VII RT 312).

(6) Based upon the reduced earnings and the projected earnings, Dyer believed it in the best interest of the Harrah's shareholders to cancel the lease, which he did on October 2, 1978 (*Id.*, RT 312, 349).

Nada asserts in her brief that Harrah's relied upon her gross revenue figures in preparing its 1978 Projections. That assertion is incorrect and not supported by the record.

Dyer's decision to terminate the lease was made on Harrah's projections, not Nada's gross revenue figures (Vol. VII RT 340). The first time he saw Nada's monthly figures was after the termination (*Id.*, 353, 356). The 1977 Projections were also not based on Nada's figures (*Id.*, 350).

There is no evidence in the record that any projection prepared by either Akmon or Stevens was based upon Nada's figures.

Nada suggests that Drews reviewed Nada's revenue figures to determine whether the lease should be cancelled (AOB, p. 14). Drews, however, testified that Harrah's did not need Nada's figures, because Harrah's had oper-

ated gift shops at other locations (Vol. VIII RT 675-676), and that he had never seen Nada's monthly figures (*Id.*, RT 677).

Nada also argues with the evidence as to whether Harrah's earnings were down from March through September, 1978 (AOB, p. 19). She refers the court to Exhibit "T", which is an annual report dated September 15, 1978. She fails to mention, however, that the annual report covered the fiscal year of July 1, 1977 to June 30, 1978, the fourth quarter was for April, May and June, 1978, the annual report did not include the months of July, August, and September of 1978, and Dyer's decision to cancel was based upon the months of March through September, 1978, not the annual report. (Vol. VII RT 309, 311).

D. SHEPPARD'S ROLE

After deciding to cancel the 1978 Lease Renewal, Dyer requested Sheppard to prepare the cancellation notice and to deliver it to Nada on October 2, 1978, which he did. (Vol. VII RT 275, 299-300, Exhibit "L").

In December, 1979, Dyer became concerned that Nada was not moving.[19] He told Sheppard to contact Nada to see if he could help. (Vol. VII RT 304-305). Sheppard contacted Nada and said that he noticed that she was not selling her inventory. Sheppard offered to buy her inventory and other items. Nada asked Sheppard to renew the lease. Sheppard said he would have to talk to Dyer and get back to her. When he called back, he told her

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[19]Nada was to vacate the premises by January 1, 1979.

Harrah's would not renew the lease, but Harrah's would give her more time to get out if it would help. (*Id.*, RT 190-192). Thereafter, Sheppard sent Nada a letter extending the date to vacate from January 1, 1979 to February 28, 1979. (Exhibit "M").

The foregoing is Sheppard's sole involvement in this case.

E. "THE STORE"

1. Merchandising and Inventory

Nada operated Luke's in the Byington Building until her lease expired on February 28, 1979. The operation included a souvenir-gift shop and a camera shop. (AOB, pp. 4, 5, 16).

In the latter part of February, 1979, Luke's camera shop was moved to 4966 South Virginia (Vol. VIII RT 682), and was still located there as of the time of the trial (Vol. VII RT 196-197).

On May 9, 1979, Harrah's opened a gift shop at the Byington Building premises, operating under the business name of "The Store." (Vol. VIII RT 485, 642). Dave Wirshing ("Wirshing"), customer services manager for Harrah's, became the manager of The Store (*Id.*, RT 483-484).

Wirshing had recommended that the location be used as a combination slot carousel, gift shop and teen arcade. (*Id.*, RT 510). The operation of The Store included slot machines, a gift shop, a leather shop and a stationery outlet. The type of merchandise sold included jewelry, decorative accessories, stationery, souvenirs, T-shirts, toys,

porcelain, sundries, tobacco, beverages and liquor, photography film and accessories, publications and leather products. (Vol. VII RT 331; Vol. VIII RT 497; Vol. IX RT 903-908; Exhibit "13").

Wirshing was responsible for the exterior and interior layout of, (*Id.*, RT 513), and the merchandise to be carried in The Store. (*Id.*, RT 511).

The emphasis of The Store was to be gift items rather than souvenirs (*Id.*, RT 486). Harrah's had been in the gift shop business an estimated 25 years (*Id.*, RT 511). The merchandise placed in The Store was the same merchandise that Harrah's had been previously selling at its other locations: Tahoe Gift Shop, Tahoe Souvenir Shop, Tahoe Premium Center, the Sundry Shop at Lake Tahoe, the Reno Gift and Premium Centers, the Infirmational Center in Reno and at Harrah's Automobile Collection (*Ibid.*).

In making decisions as to which items would be placed in The Store, Wirshing worked closely with the Buyer for Harrah's, Gloria Julius ("Julius"). (Vol. IX RT 898). Julius was responsible for purchasing for the retail outlets of Harrah's, which included the Reno and Tahoe shops and Harrah's Automobile Collection. (*Id.*, RT 896-897). It was Harrah's desire to continue with the lines that had done well in the past, and to create a shop with a pleasant atmosphere, with unique gift items, so that The Store would be a very interesting or memorable place to shop (*Id.*, RT 902). The Store was described as "a Park Avenue Store" by Nada's expert witness Eric Greenlees ("Greenlees"). (Vol. VIII RT 834). Wirshing was un-

familiar with Nada's inventory (Vol. VIII 495, 497), and in setting up The Store, Harrah's relied upon Harrah's prior experience and made no effort to determine Nada's suppliers. (Vol. IX 901-902).

Julius prepared a schedule of the suppliers used by Harrah's before The Store was opened and those used at The Store (Exhibit "12"). That schedule reflected that Harrah's continued to use the same basic suppliers and lines in The Store as it had previously used in its other retail outlets (Exhibit "12"), Vol. IX RT 899-901).

For the trial, Julius also prepared an analysis of the inventory carried by Luke's in comparison to that carried by The Stare (Exhibit "13). The analysis reflected a different emphasis in merchandising between the two establishments. For example, 38% of the inventory of Luke's was classified as souvenirs, while the largest selling item in The Store was jewelry, followed by decorative accessories, which represented over ⅓ of the sales. Souvenirs were 3rd or 4th in sales (Vol. IX RT 912, 903-912, 924-925).

2. The Store's Interior and Exterior

Before The Store was opened, Wirshing contacted Henry Conversano of Oakland, California. Conversano was a designer and decorator who had designed Harrah's Tahoe Hotel and Casino and the remodeling project for Reno Harrah's. Wirshing told Conversano that Harrah's wanted a design and plan for the Byington Building, which would upgrade the location, and that Harrah's wanted the outside of the building to look different. (Vol. III RT 513-514).

Conversano prepared plans relative to the design of the exterior of the building, which were utilized by Harrah's. (Exhibit "9"; Vol. III RT 514-516). The differences are reflected in the photographs which were presented to the jury (Exhibits "14, 15, 16").

As to the interior design and layout of The Store, Wirshing contacted Don Caylor of The Store Equipment Company of Los Angeles. Layout blueprints and drawings were prepared by Caylor relative to the location of fixtures, equipment and gondolas, including the type of gondolas or fixtures (Exhibit "10"), which plans were utilized by Harrah's relative to the interior lawout of The Store. (Vol. VIII RT 516-521).

While Nada suggests that Luke's and The Store were similar, the overwhelming evidence produced on this issue is to the contrary. The design plans of Conversano and Caylor, as well as the photographs, demonstrated clearly the differences. (Exhibits "9, 10, 14, 15, 16"). Additionally, Leif Mack, Nada's manager and Greenlees testified that Luke's and The Store were different.

Mack stated that he had worked for Nada for about 11 years (Vol. VIII, RT 679), and that he was familiar with Luke's and The Store (*Id.*, RT 757-758). He stated as to the exterior, the signs, the color and texture, as well as the window appearances differed. In fact, he stated that there was no question when you looked at The Store, it was not Luke's (*Id.*, RT 758-759). He also described the differences as to the interior, concluding that when you walked through the door of The Store "there was no question in my mind that it is not Luke's." (*Id.*, RT 761, 759-761).

Greenlees, Nada's expert witness, testified that The Store was radically different than Luke's in its merchandising policy; it was radically different in that The Store was a Park Avenue Store and Luke's was "much more folksy, friendlier kind of image"; and the management of The Store was aimed at a much more limited market than Luke's (*Id.*, RT 834-836). Finally, in describing The Store, Greenlees said "it gave me a *dramatically* different impression than what I had remembered Luke's as being operated some four years earlier." (*Id.*, RT 836:5-7, emphasis added).

F. DEFAMATION

Nada asserts she was libeled by Harrah's. Again, her discussion of the facts is incomplete and misleading (AOB, pp. 21, 22, 35, 36).

Nada states "On May 9, 1979, Harrah's issued a *press release* through Robert Contois" referring the court to Exhibit "Q" (AOB, p. 21, emphasis added). Exhibit "Q" is not the press release issued by Harrah's,[20] it is a newspaper article which appeared in the local Reno newspaper[21] (See Exhibit "Q" and Vol. VIII RT 642, 652.) The press release issued by Harrah's is Exhibit "2" (hereinafter referred to as "Harrah's Release"). Nada's comments bounce between the Newspaper Article and Harrah's Release without distinction. (AOB, pp. 21, 22, 35, 36). Yet, as will be demonstrated later, the Newspaper

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[20]The same type of misstatement appears at page 35 of Nada's brief.

[21]The newspaper was the Nevada State Journal. This article will hereinafter be referred to as the "Newspaper Article."

Article, which was not authored by Harrah's, varies in material respects from Harrah's Release. Additionally, neither the Newspaper Article nor Harrah's Release defame Nada. (Exhibits "Q" and "2").

1. Harrah's Press Release

Harrah's prepared a statement dated May 7, 1979 ("Harrah's Release"), through its publicity and advertising department announcing the opening of The Store, which statement was approved by Contois. (Vol. VIII RT 645, 649). Harrah's intention was to inform the public of the opening of a facility at the corner of Second and Virginia Streets, which would be operated by Harrah's under the name "The Store" (*Id.*, 656).

Candy Pearce, Harrah' press relations manager, testified that after Harrah's Release was put together it was approved by management and Harrah's attorneys. She was then assigned as the person at Harrah's who the media could contact to verify information or ask questions. (Vol. IX RT 946-948).

Harrah's Release was delivered to the Reno newspaper. The Newspaper Article appeared in the newspaper 2 days later, and though it differed in many respects from Harrah's Release, Pearce was not contacted in the interim relative to the Newspaper Article or any of the changes. (*Id.*, RT 946-947; Exhibit "2" and Exhibit "Q").

The record is barren of any evidence that Harrah's Release refers to or mentions Nada or Luke's, or that there is anything contained in it which defames Nada or Luke's.

2. The Newspaper Article

The Newspaper Article (Exhibit "Q") was prepared and published by the local newspaper, not by Harrah's. The Newspaper Article was not an accurate and true copy of Harrah's Release, and according to Contois as well as a review of the two exhibits, there were "significant differences." (*Id.*, Vol. VIII RT 644:8-10).

The differences can be summarized as follows:

(1) The Newspaper Article referred to the prior tenant, Luke's, and that the Luke's lease had been cancelled. Harrah's Release did not contain such information. (Vol. VIII RT 653, Exhibits "Q" and "2").

(2) The newspaper quotes Contois as stating that the "giant gaming establishment's new venture into the gift shop business is aimed at upgrading Reno's busiest tourist intersection." No such quotation appears in Harrah's Release. Harrah's Release does not refer to the opening of The Store as a "new venture into the gift shop business," but merely a venture. As previously indicated, Harrah's had been in the gift shop business for 25 years (*Id.*, RT 653-654).

(3) As to Harrah's statement that the venture was aimed at upgrading the corner, Harrah' Release explained that the 3-story building "is undergoing a face lift while the street level is being completely remodeled." No such information is present in the Newspaper Article (*Id.*, RT 654).

(4) Nor does the Newspaper Article mention that The Store would have slot machines, as was mentioned in Harrah's Release (*Id.*, RT 654).

(5) Nor does the Newspaper Article mention that the statements made by Harrah's as contained in the release were based on its "experience with Harrah's gift shops in Reno and Lake Tahoe" and that Harrah's would be "offering the same range of items as we presently do but on a wider selection", as Contois stated in the release (*Id.*, RT 655:4-10).

3. Absence of Defamation

Harrah's Release does not contain any libelous statement as to Nada. The Newspaper Article was neither approved nor authored by Harrah's as published.

The record is also absent evidence of malice in fact. Before delivering Harrah's Press Release to the newspaper, it was approved by legal counsel. There is no evidence in the record that Contois acted maliciously or with ill will, in fact, he stated that he never met Nada until after she sued him. (Vol. VIII RT 651)

The absence of defamation in the Newspaper Article is supported by the testimony of Mack, Nada's manager, who said the article did not contain anything that was "factually false" (Vol. VIII RT 763:6-11). Further, Nada had not lost any business, or business dealings, or suffered any damage to her business reputation as a result of the publication of the Newspaper Article. (*Id.*, 763). There is no evidence of Nada having sustained any special damage by reason of the published Newspaper Article.

APPENDIX C

Petitioner's Issues Presented For Review
To The Nevada Supreme Court

ISSUES PRESENTED FOR REVIEW

The trial court erred in entering its order pursuant to Rule 50(a) for a directed verdict in favor of defendants and against plaintiff at the close of the case on the grounds that there were no general issues as to any material facts as to plaintiff's claims of:

(1) Tortious bad faith breach of contract;

(2) Breach of a fiduciary relationship;

(3) Unfair competition, misappropriation, unjust enrichment;

(4) Defamation;

and dismissing same.

(5) The trial court erred in dismissing Mead Dixon, Robert Contois, Maurice Sheppard and Art Smith as parties defendants.

(6) The trial court committed prujudicial error in instructing the jury on an issue of fact not substantiated by the evidence.

(7) Trial court committed prejudicial error in not instructing the jury on all the theories of plaintiff's case.

(8) The jury verdict is erroneous and not supported by the evidence.